



## **ENVIRONMENTAL PROTECTION AGENCY**

**[EPA-HQ-OAR-2012-0742; FRL 9906-14-OAR ]**

### **California State Nonroad Engine Pollution Control Standards; Off-Highway Recreational Vehicles and Engines; Notice of Decision**

**AGENCY:** Environmental Protection Agency (EPA)

**ACTION:** Notice of Decision

**SUMMARY:** The Environmental Protection Agency (EPA) is granting the California Air Resources Board's (CARB's) request for authorization of amendments to California's Off-Highway Recreational Vehicles and Engines (OHRV) regulations, confirming that certain OHRV amendments are within-the-scope of prior EPA authorizations, and confirming that certain OHRV amendments are not preempted by Clean Air Act. CARB's OHRV regulations apply to all off-highway recreational vehicles (and to engines manufactured for use in such vehicles) produced on or after January 1, 1997, for sale, lease, use and introduction into commerce in California. This decision is issued under the authority of the Clean Air Act (CAA or Act).

**DATES:** Petitions for review must be filed by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** EPA has established a docket for this action under Docket ID EPA-HQ-OAR-2012-0742. All documents relied upon in making this decision, including those submitted to EPA by CARB, are contained in the public docket. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building,

Room 3334, located at 1301 Constitution Avenue, NW, Washington, DC. The Public Reading Room is open to the public on all federal government working days from 8:30 a.m. to 4:30 p.m.; generally, it is open Monday through Friday, excluding holidays. The telephone number for the Reading Room is (202) 566-1744. The Air and Radiation Docket and Information Center's website is <http://www.epa.gov/oar/docket.html>. The electronic mail (e-mail) address for the Air and Radiation Docket is: [a-and-r-Docket@epa.gov](mailto:a-and-r-Docket@epa.gov), the telephone number is (202) 566-1742, and the fax number is (202) 566-9744. An electronic version of the public docket is available through the federal government's electronic public docket and comment system. You may access EPA dockets at <http://www.regulations.gov>. After opening the [www.regulations.gov](http://www.regulations.gov) website, enter EPA-HQ-OAR-2012-0742 in the "Enter Keyword or ID" fill-in box to view documents in the record. Although a part of the official docket, the public docket does not include Confidential Business Information ("CBI") or other information whose disclosure is restricted by statute.

EPA's Office of Transportation and Air Quality ("OTAQ") maintains a webpage that contains general information on its review of California waiver and authorization requests. Included on that page are links to prior waiver *Federal Register* notices, some of which are cited in today's notice; the page can be accessed at <http://www.epa.gov/otaq/cafr.htm>.

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## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

In 1994, CARB adopted emission standards and test procedures for OHRVs. At that time, there were no analogous federal standards regulating emissions from the vehicles and engines covered by California's OHRV regulations. EPA authorized CARB's 1994 OHRV regulations in 1996.<sup>1</sup> California subsequently adopted three rounds of amendments to these regulations, the first in 1999, the second in 2003, and the third in 2006. CARB requested that EPA authorize each of these three amendment packages in letters dated March 24, 2000, November 19, 2004, and March 24, 2010, respectively.<sup>2</sup> The March 24, 2010 request explicitly incorporates the previous two requests, and EPA here considers all three requests concurrently.

#### *A. California's Authorization Requests*

The 1999 OHRV amendments did not change the numerical exhaust emission standards for OHRVs, but added a new compliance category that allowed OHRVs not meeting the applicable emissions standards to be certified subject to use restrictions (i.e., use in specified areas during specified times of the year). Such non-emissions-compliant OHRVs would be identified with a red sticker or "red tag," while emissions-compliant OHRVs would be identified with a green sticker or "green tag." The amendments also removed a competition vehicle exemption provision and added all-terrain vehicles (ATVs) over 600 pounds (lbs) to the existing definition of ATV. CARB requested that

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<sup>1</sup> "California State Nonroad Engine and Vehicle Pollution Control Standards; Authorization of State Standards; Notice of Decision," 61 FR 69093 (December 31, 1996).

<sup>2</sup> CARB Request for Authorization Letter, March 24, 2000 ("2000 Request"), EPA-HQ-OAR-2012-0742-0002; CARB Request for Authorization Letter, February 19, 2004 ("2004 Request"), EPA-HQ-OAR-2012-0742-0008; CARB Request for Authorization Letter, March 24, 2010 ("2010 Request"), EPA-HQ-OAR-2012-0742-0014.

EPA confirm a within-the-scope determination for the red tag program and for the removal of the competition exemption, and grant a full authorization for the addition of ATVs over 600 lbs.

According to CARB, the goal of the 1999 amendments was to provide economic relief to vehicle dealers in California who were contractually bound to sell products that did not meet the emission standards California established in 1994.<sup>3</sup> Prior to the 1999 amendments, two-stroke off-highway motorcycles could only be sold as competition models, and their use was limited to closed-course competitions. Following the amendments, such competition vehicles would be red tagged and allowed to operate during certain times of the year in certain geographic areas. The amendments provided for red tagged vehicles to be certified and sold in California and to be operated in two situations. First, in “unlimited use areas,” which are certain recreational use areas located in regions in attainment with the National Ambient Air Quality Standard (NAAQS) for ozone, red-tagged vehicles could be used without restriction, year-round. Second, in “limited use areas,” which are certain recreational use areas located in regions classified as nonattainment for the ozone NAAQS, red-tagged vehicles could be used only during “riding seasons” specified for each area. The riding seasons in limited use areas restricted the operation of red-tagged vehicles during peak ozone periods, when the area was typically not in attainment with the ozone standard, usually the summer months. Out of more than 100 designated riding areas, approximately one-third were unlimited use areas and two-thirds were limited use areas.<sup>4</sup> The vast majority of the riding areas were

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<sup>3</sup> 2000 Request, *supra* note 2, at 2.

<sup>4</sup> “Initial Statement of Reasons, Public Hearing to Consider Amendments to the California Regulations for New 1997 and Later Off-Highway Recreational Vehicles and Engines,” October 23, 1999, EPA-HQ-OAR-2012-0742-0030, at 6.

established on public lands managed by the California Department of Parks and Recreation, the United States Forest Service, or the United States Bureau of Land Management. CARB predicted that the red tag program would result in lower emissions from OHRVs in limited use areas during peak ozone periods, but higher emissions and a “possible minor impact on PM or toxics” in unlimited use areas, limited use areas during non-peak seasons, and on a state-wide average.<sup>5</sup> However, these predicted increases in emissions from OHRVs were expected to increase pollutants of concern only negligibly, and to have no impact on ozone air quality since exceedances of the ozone standard would not occur during the period in which riding was allowed.<sup>6</sup>

The 2003 amendment modified the OHRV regulations to change and clarify the start date of the red tag program. California’s authorization request stated that the regulatory change was needed to correct the “practical delay” in enforcement of the 1999 red tag program and to confirm that the riding season use restrictions would begin with the 2003 model year.<sup>7</sup> CARB sought a within-the-scope determination for this amendment.<sup>8</sup>

The 2006 amendments made three further changes to California’s OHRV regulations. First, California added evaporative emission standards for OHRVs that aligned with federal standards for 2008 and later model year vehicles. Second, the amendments reclassified sand cars, off-road utility vehicles and off-road sport vehicles as OHRVs, to align with the federal classification of these vehicles. Each of these vehicle

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<sup>5</sup> *Id.* at 8. CARB predicted lower emissions in limited use areas because red tag vehicles would be prohibited there during peak ozone seasons, whereas prior to the amendments these vehicles would have been covered by the competition exemption and their use would have been allowed year round.

<sup>6</sup> *Id.* at 7.

<sup>7</sup> 2004 Request, *supra* note 2, at 1.

<sup>8</sup> At the same time, CARB argued that future amendments of riding seasons and riding areas should not be subject to EPA approval, because they should be treated as “operational controls” not preempted under section 209(d) of the Clean Air Act. *Id.* at note 1.

categories had previously been regulated under other federally-authorized California regulations as small off-road or large off-road spark-ignition engines. The 2006 amendments set new emission standards for these three additional classes of vehicles that aligned with or exceeded the stringency of federal standards.<sup>9</sup> Third, the list of riding areas and riding seasons was amended to add a few new attainment areas.

CARB's 2010 request regarding the 2006 amendments sought (1) a full authorization for the evaporative emissions standard, (2) a within-the-scope determination for the reclassification of sand cars, off-road sport vehicles and off-road utility vehicles, and (3) a declaration that the riding areas and riding seasons amendment does not require EPA authorization because the designation of seasonal and geographical use specifications is an operational control and is accordingly not preempted by section 209 of the Act.<sup>10</sup> California also requested, in the alternative, that the riding season amendments be considered within the scope of EPA's 1996 authorization of CARB's 1994 OHRV regulations. Finally, CARB requested that EPA concurrently consider and render a decision on the pending authorization requests for the 1999 and 2003 amendments.

#### *B. Clean Air Act Nonroad Engine and Vehicle Authorizations*

Section 209(e)(1) of the Act permanently preempts any state, or political subdivision thereof, from adopting or attempting to enforce any standard or other requirement relating to the control of emissions for certain *new* nonroad engines or vehicles.<sup>11</sup> For all other nonroad engines (including "non-new" engines), states generally

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<sup>9</sup> 2010 Request, *supra* note 2, at 4-6.

<sup>10</sup> *Id.* at 1-2.

<sup>11</sup> States are expressly preempted from adopting or attempting to enforce any standard or other requirement relating to the control of emissions from new nonroad engines which are used in construction equipment or

are preempted from adopting and enforcing standards and other requirements relating to the control of emissions, except that section 209(e)(2)(A) of the Act requires EPA, after notice and opportunity for public hearing, to authorize California to adopt and enforce such regulations unless EPA makes one of three enumerated findings. Specifically, EPA must deny authorization if the Administrator finds that (1) California's protectiveness determination (i.e., that California standards will be, in the aggregate, as protective of public health and welfare as applicable federal standards) is arbitrary and capricious, (2) California does not need such standards to meet compelling and extraordinary conditions, or (3) the California standards and accompanying enforcement procedures are not consistent with section 209 of the Act.

On July 20, 1994, EPA promulgated a rule interpreting the three criteria set forth in section 209(e)(2)(A) that EPA must consider before granting any California authorization request for nonroad engine or vehicle emission standards.<sup>12</sup> EPA revised these regulations in 1997.<sup>13</sup> As stated in the preamble to the 1994 rule, EPA historically has interpreted the consistency inquiry under the third criterion, outlined above and set forth in section 209(e)(2)(A)(iii), to require, at minimum, that California standards and enforcement procedures be consistent with section 209(a), section 209(e)(1), and section 209(b)(1)(C) of the Act.<sup>14</sup>

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vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower. Such express preemption under section 209(e)(1) of the Act also applies to new locomotives or new engines used in locomotives.

<sup>12</sup> See "Air Pollution Control; Preemption of State Regulation for Nonroad Engine and Vehicle Standards," 59 FR 36969 (July 20, 1994).

<sup>13</sup> See "Control of Air Pollution: Emission Standards for New Nonroad Compression-Ignition Engines at or Above 37 Kilowatts; Preemption of State Regulation for Nonroad Engine and Vehicle Standards; Amendments to Rules," 62 FR 67733 (December 30, 1997). The applicable regulations are now found in 40 CFR part 1074, subpart B, section 1074.105.

<sup>14</sup> See *supra* note 12. EPA has interpreted 209(b)(1)(C) in the context of section 209(b) motor vehicle waivers.

In order to be consistent with section 209(a), California’s nonroad standards and enforcement procedures must not apply to new motor vehicles or new motor vehicle engines. To be consistent with section 209(e)(1), California’s nonroad standards and enforcement procedures must not attempt to regulate engine categories that are permanently preempted from state regulation. To determine consistency with section 209(b)(1)(C), EPA typically reviews nonroad authorization requests under the same “consistency” criteria that are applied to motor vehicle waiver requests under section 209(b)(1)(C). That provision provides that the Administrator shall not grant California a motor vehicle waiver if she finds that California “standards and accompanying enforcement procedures are not consistent with section 202(a)” of the Act. Previous decisions granting waivers and authorizations have noted that state standards and enforcement procedures will be found to be inconsistent with section 202(a) if (1) there is inadequate lead time to permit the development of the necessary technology, giving appropriate consideration to the cost of compliance within that time, or (2) the federal and state testing procedures impose inconsistent certification requirements.

In light of the similar language of sections 209(b) and 209(e)(2)(A), EPA has reviewed California’s requests for authorization of nonroad vehicle or engine standards under section 209(e)(2)(A) using the same principles that it has historically applied in reviewing requests for waivers of preemption for new motor vehicle or new motor vehicle engine standards under section 209(b).<sup>15</sup> These principles include, among other things, that EPA should limit its inquiry to the three specific authorization criteria

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<sup>15</sup> See *Engine Manufacturers Association v. EPA*, 88 F.3d 1075, 1087 (D.C. Cir. 1996): “... EPA was within the bounds of permissible construction in analogizing §209(e) on nonroad sources to §209(a) on motor vehicles.”



identified in section 209(e)(2)(A),<sup>16</sup> and that EPA should give substantial deference to the policy judgments California has made in adopting its regulations. In previous waiver decisions, EPA has stated that Congress intended EPA's review of California's decision-making be narrow. EPA has rejected arguments that are not specified in the statute as grounds for denying a waiver:

The law makes it clear that the waiver requests cannot be denied unless the specific findings designated in the statute can properly be made. The issue of whether a proposed California requirement is likely to result in only marginal improvement in California air quality not commensurate with its costs or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to my decision under section 209, so long as the California requirement is consistent with section 202(a) and is more stringent than applicable Federal requirements in the sense that it may result in some further reduction in air pollution in California.<sup>17</sup>

This principle of narrow EPA review has been upheld by the U.S. Court of Appeals for the District of Columbia Circuit.<sup>18</sup> Thus, EPA's consideration of all the evidence submitted concerning an authorization decision is circumscribed by its relevance to those questions that may be considered under section 209(e)(2)(A).

### *C. Within-the-scope Determinations*

If California amends regulations that were previously authorized by EPA, California may ask EPA to determine that the amendments are within the scope of the earlier authorization. A within-the-scope determination for such amendments is permissible without a full authorization review if three conditions are met. First, the

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<sup>16</sup> See *supra* note 12, at 36983.

<sup>17</sup> "Waiver of Application of Clean Air Act to California State Standards," 36 FR 17458 (Aug. 31, 1971). Note that the more stringent standard expressed here, in 1971, was superseded by the 1977 amendments to section 209, which established that California must determine that its standards are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. In the 1990 amendments to section 209, Congress established section 209(e) and similar language in section 209(e)(1)(i) pertaining to California's nonroad emission standards which California must determine to be, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

<sup>18</sup> See, e.g., *Motor and Equip. Mfrs Assoc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) ("*MEMA I*").

amended regulations must not undermine California's previous determination that its standards, in the aggregate, are as protective of public health and welfare as applicable federal standards. Second, the amended regulations must not affect consistency with section 209 of the Act, following the same criteria discussed above in the context of full authorizations. Third, the amended regulations must not raise any "new issues" affecting EPA's prior waivers.<sup>19</sup>

#### *D. Burden and Standard of Proof*

As the U.S. Court of Appeals for the D.C. Circuit has made clear in *MEMA I*, opponents of a waiver request by California bear the burden of showing that the statutory criteria for a denial of the request have been met:

[T]he language of the statute and its legislative history indicate that California's regulations, and California's determinations that they must comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.<sup>20</sup>

The Administrator's burden, on the other hand, is to make a reasonable evaluation of the information in the record in coming to the waiver decision. As the court in *MEMA I* stated: "here, too, if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if he seeks to overcome that evidence with unsupported assumptions of his own, he runs the risk of having his waiver decision set aside as

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<sup>19</sup> See "California State Motor Vehicle Pollution Control Standards; Amendments Within the Scope of Previous Waiver of Federal Preemption," 46 FR 36742 (July 15, 1981).

<sup>20</sup> *MEMA I*, *supra* note 19, at 1121.

‘arbitrary and capricious.’”<sup>21</sup> Therefore, the Administrator’s burden is to act “reasonably.”<sup>22</sup>

With regard to the standard of proof, the court in *MEMA I* explained that the Administrator’s role in a section 209 proceeding is to:

[...]consider all evidence that passes the threshold test of materiality and \*  
\* \* thereafter assess such material evidence against a standard of proof to  
determine whether the parties favoring a denial of the waiver have shown  
that the factual circumstances exist in which Congress intended a denial of  
the waiver.<sup>23</sup>

In that decision, the court considered the standards of proof under section 209 for the two findings related to granting a waiver for an “accompanying enforcement procedure.”

Those findings involve: (1) whether the enforcement procedures impact California’s prior protectiveness determination for the associated standards, and (2) whether the procedures are consistent with section 202(a). The principles set forth by the court, however, are similarly applicable to an EPA review of a request for a waiver of preemption for a standard. The court instructed that “the standard of proof must take account of the nature of the risk of error involved in any given decision, and it therefore varies with the finding involved. We need not decide how this standard operates in every waiver decision.”<sup>24</sup>

With regard to the protectiveness finding, the court upheld the Administrator’s position that, to deny a waiver, there must be “clear and compelling evidence” to show that proposed enforcement procedures undermine the protectiveness of California’s standards.<sup>25</sup> The court noted that this standard of proof also accords with the

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<sup>21</sup> *Id.* at 1126.

<sup>22</sup> *Id.* at 1126.

<sup>23</sup> *Id.* at 1122.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

congressional intent to provide California with the broadest possible discretion in setting regulations it finds protective of the public health and welfare.<sup>26</sup>

With respect to the consistency finding, the court did not articulate a standard of proof applicable to all proceedings, but found that the opponents of the waiver were unable to meet their burden of proof even if the standard were a mere preponderance of the evidence. Although *MEMA I* did not explicitly consider the standards of proof under section 209 concerning a waiver request for “standards,”” as compared to a waiver request for accompanying enforcement procedures, there is nothing in the opinion to suggest that the court’s analysis would not apply with equal force to such determinations. EPA’s past waiver decisions have consistently made clear that: “[E]ven in the two areas concededly reserved for Federal judgment by this legislation – the existence of ‘compelling and extraordinary’ conditions and whether the standards are technologically feasible – Congress intended that the standards of EPA review of the State decision to be a narrow one.”<sup>27</sup>

*E. EPA’s Administrative Process in Consideration of California’s OHRV Amendment Requests for Authorization*

On January 4, 2013, EPA published a *Federal Register* notice announcing its receipt of California’s authorization request. In that notice, EPA invited public comment on each of the 2006 amendments, as well as on the prior authorization requests for

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<sup>26</sup> *Id.*

<sup>27</sup> *See, e.g.*, “California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption,” 40 FR 23102 (May 28, 1975), at 23103.

amendments California adopted in 1999 and 2003.<sup>28</sup> The request for comments specifically referred, but was not limited, to the following issues.

First, EPA requested comment on the 1999 amendments, as follows: (1) Should California's 1999 OHRV amendments, specifically the provision for certification of OHRVs that do not meet the emissions criteria (the red tag amendment) and the removal of the competition exemption, be considered under the within-the-scope analysis, or should they be considered under the full authorization criteria? (2) If those amendments should be considered as a within-the-scope request, do they meet the criteria for EPA to grant a within-the-scope confirmation? (3) Alternatively, if the red tag amendment and removal of the competition exemption should not be considered under the within-the-scope analysis, or in the event that EPA determines they are not within the scope of the previous authorization, do they meet the criteria for making a full authorization determination? (4) Does the removal of the 600 lb weight limitation in the definition of ATV meet the criteria for making a full authorization determination?

Second, regarding the 2003 amendment, EPA requested comment on the following questions: (1) Whether the amendment limiting the red tag program to model years 2003 and later should be evaluated under the within-the-scope criteria, and if so, whether it meets the within-the-scope criteria for authorization? (2) To the extent that the 2003 amendment should be treated as a full authorization request, does the amendment meet the criteria for a full authorization?

Third, regarding the 2006 amendments, we requested comment on the following: (1) Does the amendment setting evaporative emissions standards for OHRVs meet the

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<sup>28</sup> "California State Nonroad Engine Pollution Control Standards; Off-Highway Recreational Vehicles and Engines; Request for Authorization; Opportunity for Public Hearing and Comment," 78 FR 724, (January 4, 2013).

criteria for a full authorization? (2) Does the amendment reclassifying sand cars, off-road sport vehicles and off-road utility vehicles as OHRVs fall within the scope of the original (1996) authorization? (3) Does the amendment altering the list of riding areas and riding seasons require federal authorization review, or is it not federally preempted, pursuant to CAA section 209(d)? (4) If it is preempted and therefore requires federal authorization, does the amended list of riding areas and seasons fall within the scope of the original (1996) authorization?

In response to these requests for comment, EPA received an additional submission from CARB.<sup>29</sup> EPA received no written comments from parties other than CARB and received no requests for a public hearing. Consequently, EPA did not hold a public hearing.

CARB's July 23, 2013 submission provided additional and updated information in support of its protectiveness determination for the red tag program amendment, contained in the 1999 amendment package. CARB compared its exemption for red-tagged vehicles to an analogous feature in the federal regulations, which exempts competition model OHRVs from federal emissions standards. After a detailed analysis comparing the projected emissions effects of the federally exempted competition model vehicles to California's red tagged vehicles, CARB concluded that its OHRV program "remains as protective in the aggregate as the federal program."<sup>30</sup>

## **II. Discussion**

### *A. California's 1999 Amendments*

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<sup>29</sup> Comment submitted by Richard W. Corey (CARB), July 23, 2013, EPA-HQ-OAR-2012-0742-0029.

<sup>30</sup> *Id.* at 2.

The 1999 amendment package contains three amendments, each briefly described above: the removal of the competition exemption, the addition of the red tag program, and the addition of vehicles over 600 lb to the ATV vehicle category.

#### 1. Removal of the Competition Exemption and Addition of the Red Tag Program

California's request for authorization of the amendments (1) removing the exemption from emission standard controls for competition models, and (2) introducing the red tag certification program and regional/seasonal restrictions for red-tagged vehicles are interrelated, and therefore will be treated together in this discussion. As explained by CARB in its 2000 authorization request, "[s]ince all off-highway vehicles must now be certified as either emissions-compliant with no use restrictions, or non-emissions-compliant with use restrictions, the superfluous competition vehicle definition was deleted."<sup>31</sup> CARB asserted that the competition vehicle designation and associated restrictions on the use of such vehicles were made superfluous because such vehicles would be subsumed in the non-emissions-compliant red tagged category of vehicles, and their use would be limited to the newly designated riding areas and seasons.

##### a. Within-the-scope Analysis

California requested that the amendments establishing the red tag program and removing the competition exemption both be treated as within the scope of the original EPA authorization of the OHRV program. California asserted that the amendments met all three within-the-scope criteria, i.e. that the amendments: (1) do not undermine the original protectiveness determination underlying California's OHRV regulations, (2) do

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<sup>31</sup> 2000 Request, *supra* note 2, at 4.

not affect the consistency of the OHRV regulations with section 202(a), and (3) do not raise any new issues affecting the prior authorization.<sup>32</sup>

Beginning with the third criterion, CARB asserted that “[t]he regional/seasonal approach, while establishing a new regulatory section, does not force any change in technology to warrant revisiting conclusions reached in granting the existing authorization.”<sup>33</sup> CARB further stated that it was not aware of any new issues presented by the red tag program or the removal of the competition exemption. EPA appreciates that the regional/seasonal approach does not change the numeric emissions standards or test procedures approved in the original authorization of California’s OHRV regulations. However, the shift from exempting one class of vehicles (competition models) from those standards to certifying and allowing a potentially different class of vehicles (non-emissions-compliant vehicles) to operate regionally/seasonally is a major change in the application and meaning of those standards, the practical effects of which could have a significant impact on the aggregate emissions of OHRVs in California. Furthermore, while at the time of the request there were no comparable federal regulations for OHRVs against which to compare California’s regulations, there are such federal regulations now.<sup>34</sup> The analogous federal program regulating OHRVs stands in stark contrast to California’s program, insofar as the federal program exempts competition-only models from regulation (allowing their full and unrestricted use) and does not allow non-competition, red-tagged vehicles to be certified at all. Indeed, California’s approach of certifying red-tagged vehicles to operate in limited areas and/or during limited seasons is

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<sup>32</sup> *Id.* at 8-11.

<sup>33</sup> *Id.* at 10.

<sup>34</sup> See 40 CFR Part 1051, “Control of Emissions From Recreational Engines and Vehicles”.



without parallel in the field of federal mobile source emissions regulations across all classes of vehicles.

EPA finds that the regional/seasonal program and removal of the competition exemption fundamentally change California's previously authorized OHRV program. First, they present a shift in the application and potential practical effects of the previously authorized emission standards. They also represent a significant departure from the standard regulatory structure used in the parallel federal OHRV emissions regulations. EPA consequently views these changes, collectively, as a new issue that precludes a within-the-scope determination. Since the "new issue" prong of the within-the-scope criteria is not met, EPA must treat these amendments as full authorization requests, and will analyze them as such.<sup>35</sup>

#### b. Full Authorization Analysis

The first prong of the full authorization analysis is whether California's protectiveness determination (that the standards including the red tag program are, in the aggregate, at least as protective of public health and welfare as otherwise applicable federal standards) is arbitrary or capricious. California's original protectiveness determination for these amendments was made at a time when no comparable federal standards existed; therefore CARB's determination that its standards were, in the aggregate, at least as protective as the (non-existent) federal standards was relatively straightforward. California's subsequent requests for authorization (2004 and 2010) generally referred back to the original analysis and did not substantively update the protectiveness determination. Regardless of whether CARB's original protectiveness

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<sup>35</sup> EPA cannot find that these amendments are within the scope of the previous authorization because they failed to satisfy the "new issue" criterion. We must therefore proceed with a full authorization analysis; there is no need to analyze whether the other two prongs of the within-the-scope analysis are met.

determination was or was not arbitrary or capricious at the time it was made, EPA must now evaluate California's determination in light of the current federal standards, not those in place at the time California's regulations were promulgated.<sup>36</sup> For this reason, CARB submitted additional information in response to our request for public comments to update its protectiveness determination for the red tag program, considering current federal OHRV standards.<sup>37</sup>

In its comments dated July 23, 2013, CARB presented a detailed analysis and argument that the inclusion of the red tag program renders its standards, in the aggregate, at least as protective as the current federal standards. CARB's analysis was based on an "apples-to-apples" comparison of whether and how the federal and California regulations would allow the sale of OHRVs, by referencing the list of competition models exempted by federal standards to the list of red-tagged vehicle models authorized for restricted use in California. CARB concluded that "the provisions for allowing noncompliant vehicle certifications and their accompanying usage restrictions provide a level of protection in California that remains, at the minimum, no worse than afforded under federal provisions as demonstrated by the established correlation between equally configured federally exempted vehicles and California noncompliant vehicles."<sup>38</sup>

We received no contrary evidence or arguments to refute California's original or supplemental protectiveness determinations. In light of CARB's detailed analysis and reasoned conclusions, and the lack of any evidence to the contrary, we cannot find that

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<sup>36</sup> This does not mean that the original protectiveness determination is arbitrary or capricious. *See* "California State Motor Vehicle Pollution Control Standards; Notice of Decision granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program and a Within-the-scope Confirmation for California's Zero Emission Vehicle Amendments for 2017 and Earlier Model Years," 78 FR 2112 (January 9, 2013), at 2124.

<sup>37</sup> *See supra* note 29.

<sup>38</sup> *Id.* at 4-5.

California's protectiveness determination regarding the red tag program is arbitrary or capricious.

Second, the Section 209(e)(2)(ii) inquiry into whether California needs such standards to meet compelling and extraordinary conditions in the state is restricted to a consideration of whether California needs its own emission standards program to meet compelling and extraordinary conditions, not whether any particular standards are necessary to meet such conditions.<sup>39</sup> In resolving to amend its OHRV regulations with the red tag program, California reaffirmed its longstanding determination that its emission standards program is necessary to meet the state's compelling and extraordinary conditions.<sup>40</sup> We received no contrary evidence or comments challenging California's determination that its emission standards program is necessary to meet these conditions. Therefore, there is no evidence that the state's emissions standards program is not still necessary to address the "compelling and extraordinary conditions" underlying the state's air pollution problems.

Third and finally, we evaluate the red tag program for consistency with section 209 of the Act, which, as discussed above, requires evaluation of consistency with sections 209(a), 209(e)(1), and 209(b)(1)(C). First, to be consistent with section 209(a), the amendments must not apply to new motor vehicles or motor vehicle engines. The Act defines "motor vehicle" as "any self-propelled vehicle designed for transporting persons

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<sup>39</sup> See California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles," 74 FR 32744 (July 8, 2009), at 32761; *see also* "California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption Notice of Decision," 49 FR 18887 (May 3, 1984), at 18889-188890.

<sup>40</sup> "State of California Air Resources Board, Resolution 98-66," December 10, 1998, EPA-HQ-OAR-2012-0742-0007.

or property on a street or highway.”<sup>41</sup> As already determined in EPA’s authorization of the original OHRV regulations, OHRVs and OHRV engines (as defined by California) are not motor vehicles or motor vehicle engines.<sup>42</sup> The definition of OHRV has not changed since that time. While OHRVs are not explicitly defined in California’s regulations, the OHRV engines subject to California’s OHRV regulations and the red tag amendments at issue here are defined as engines “[...] designed for powering off-road recreational vehicles...”<sup>43</sup> They are not designed for on-highway use and we received no evidence that any OHRVs or OHRV engines are designed as motor vehicles or motor vehicle engines. We therefore find that the vehicles and engines subject to the red tag program are not motor vehicles and that the regulations therefore are consistent with section 209(a) of the Act. Second, to be consistent with section 209(e)(1) of the Act, the regulations must not attempt to regulate those vehicles and engines explicitly preempted from state regulation by section 209(e)(1), including farm and construction equipment and engines, vehicles and engines below 175 horsepower, and new locomotives or locomotive engines. None of the vehicles or engines covered by California’s OHRV regulations fall in these categories and we received no evidence to the contrary. We therefore find the red tag amendments are consistent with section 209(e)(1). Third and finally, to be consistent with section 209(b)(1)(c), there must be adequate lead time to permit technological development for compliance with the amendment, and the state test procedures must not be made inconsistent with federal test procedures. In this case, there is no evidence that the red tag program would require any technological development, or that it would affect the consistency of federal and state test procedures. We therefore find

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<sup>41</sup> CAA section 216(2), 42 U.S.C. §7550(a).

<sup>42</sup> See Decision Document supporting 61 FR 69093, December 31, 1996, Docket A-95-17, at 30.

<sup>43</sup> 13 CA ADC §2411(a)(13).

no evidence that the standards and accompanying enforcement procedures of the red tag program and the removal of the competition exemption are inconsistent with section 209 of the Act.

After a review of the information submitted by CARB, and the record for this authorization request, EPA finds that no basis exists to demonstrate that authorization for California's amendments establishing the red tag program and removing the competition exemption from its OHRV regulations should be denied based on any of the statutory criteria of section 209(e)(2)(A). For this reason, EPA finds that an authorization for such amendments should be granted.

## 2. Addition of ATVs Over 600 lbs

California requested a full authorization for the addition of vehicles over 600 lbs to the existing class of ATVs covered by the OHRV regulations. California asserted that while most ATVs fall under the 600 lb mark, a small number of vehicles used for work applications are greater than 600 lb and do not warrant separate treatment under an additional regulatory scheme.<sup>44</sup> CARB further clarified that ATVs used in farm or construction applications are not to be included in the definition, as they are permanently preempted by section 209(e)(1) of the CAA and its implementing regulations.

As noted above, when CARB requested authorization in 2000 for the 1999 amendment expanding the ATV category to include vehicles over 600 lb, no comparable federal standards existed against which to assess the protectiveness of the California regulations. However, California's request must be judged in light of the current comparable federal regulations. Emissions from ATVs are federally regulated in 40 CFR

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<sup>44</sup> 2000 Request, *supra* note 2, at 5.

Part 1051 as part of the nonroad emission standards program.<sup>45</sup> There are no weight limits on the class of ATVs regulated under Part 1051. The federal standards in 40 CFR 1051.107 therefore apply to the expanded class of vehicles described in California’s revised definition of ATVs and are the “comparable standards” against which California’s request for authorization for its expanded class of vehicles should be judged.

First, regarding the protectiveness of California’s regulation of ATVs greater than 600 lbs, when CARB submitted its petition for authorization of additional amendments in 2004, it re-evaluated its OHRV standards (including the standards applicable to vehicles greater than 600 lb) in light of the newly promulgated federal Part 1051 standards. Citing EPA’s own analysis of the comparative emission standards for ATVs detailed in the preamble to the 2002 federal rulemaking, CARB found that the California and federal standards were roughly equivalent with the main difference being the federal inclusion of the competition exemption versus California’s red tag program.<sup>46</sup> Taken as a whole, CARB concluded that California’s program for ATVs, including those over 600 lb, remained at least as protective as the federal program. We received no comments or evidence contradicting this determination, and therefore we cannot find that California’s protectiveness determination is arbitrary or capricious.

Second, and as noted above with regard to the red tag amendments that CARB adopted concurrently, California maintained that its mobile source pollution program is still necessary to meet compelling and extraordinary conditions in the state. We received no contrary evidence or comments challenging this assertion. We therefore find that there is no evidence that the state’s emission standards program is not still necessary to

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<sup>45</sup> 40 CFR 1051.1(a)(3)

<sup>46</sup> 2004 Request, *supra* note 2, at 3.

address the “compelling and extraordinary conditions” underlying the state’s air pollution problems.

Third and finally, the removal of the 600 lb weight limit must be found consistent with section 209 of the Act if it: (1) does not regulate new motor vehicles or motor vehicle engines per section 209(a) or any of the vehicles or engines specified in section 209(e)(1), (2) is not technologically infeasible for manufacturers to meet the standards within the lead time provided, or (3) does not establish test procedures inconsistent with federal test procedures for the same vehicle class, per section 209(b)(1)(C). First, ATVs are defined as being designed for off-highway use,<sup>47</sup> so the regulation does not seek to regulate “motor vehicles” and is consistent with section 209(a). Second, ATVs are not among the classes of vehicles permanently preempted by federal regulations and so this amendment is consistent with section 209(e)(1). Third and finally, there is no evidence of inadequate lead time to permit technological development for compliance with the amendment, nor are the CARB test procedures regarding ATVs made inconsistent with federal test procedures by this amendment. We therefore find no evidence that the amendment is inconsistent with section 209 of the Act.

Having met the three criteria for full authorization, the amendment to add vehicles over 600 lb gross weight to California’s OHRV emission standards must be authorized.

#### *B. California’s 2003 Amendment*

The sole 2003 amendment presented for authorization is a change in the effective date of the riding season use restrictions for red-tagged vehicles from 1999 (the date of the original amendments) to 2003. California requested that EPA evaluate this amendment as within the scope of the earlier authorization.

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<sup>47</sup> 13 CA ADC § 2411(a)(1).

Following the passage of the 1999 amendments, California's Department of Motor Vehicles (DMV) and Department of Parks and Recreation (DPR) were unable to properly enforce the new regulations as written, due to a lack of institutional resources and problems with DMV's registration system. This resulted in inconsistencies in the labeling and certification of some OHRVs. For example, some non-emissions-compliant OHRVs, which should have been red-tagged, were registered with green tags, and some emissions-compliant OHRVs, which should have been green-tagged, were registered with red stickers.<sup>48</sup> As of 2003, however, the implementing agencies, DMV and DPR, committed to automate the OHRV registration system and enforce the riding season limitations. The amendment to change the riding season use restrictions to apply only to 2003 MY and later vehicles was intended to "simply reflect the delay in riding season enforcement that occurred in the field by the land management agencies."<sup>49</sup>

California asserted that the amendment met all three within-the-scope criteria, i.e. that it: (1) does not undermine the original protectiveness determination underlying California's OHRV regulations, (2) does not affect the consistency of the OHRV regulations with section 202(a), and (3) does not raise any new issues affecting the prior authorization.<sup>50</sup> We received no adverse comments or evidence suggesting a within-the-scope analysis is inappropriate, or that the 2003 amendment fails to meet any of the three criteria for within-the-scope confirmation.

First, California asserted that the amendment to the effective start date of the red tag program clearly did not undermine the original protectiveness determination

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<sup>48</sup> "State of California Air Resources Board, Initial Statement of Reasons," June 6, 2003, EPA-HQ-OAR-2012-0742-0010, at 4.

<sup>49</sup> *Id.*

<sup>50</sup> 2004 Request, *supra* note 2, at 2.



underlying California's OHRV regulations because it does not change any of the substantive criteria or parameters of that program, but rather is an administrative date change. Furthermore, at the time the request was made (2004), the federal standards were not yet effective until MY 2006, so California's program remained without a federal parallel even during the period between the intended start date and the amended start date.<sup>51</sup> We therefore cannot find that the delay in the effective date of the red tag program undermines the protectiveness determination made with regard to the original red tag program.

Second, this amendment did not attempt to regulate new motor vehicles or motor vehicle engines and so is consistent with section 209(a). It likewise did not attempt to regulate any of the permanently preempted engines or vehicles, and so is consistent with section 209(e)(1). Finally, it did not cause any technological feasibility issues for manufacturers or cause inconsistency between state and federal test procedures, per section 209(b)(1)(C). The difficulties in implementing the red tag program as written in 1999 were not due to technological difficulties for manufacturers but rather to the state's administrative difficulties. There were therefore no lead-time or technological problems created by the delayed start date amendment. In fact, to the extent that there were problems at all relevant to the red tag program, these were administrative problems that were relieved by the delayed start date. The delayed start date had no bearing on the consistency between the California and federal certification requirements. We therefore find no evidence that the delayed start date amendment is inconsistent with section 209 of the Act.

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<sup>51</sup> *Id.*

Third, California stated that the delayed start date raised no new issues, and we have received no evidence to the contrary. The change in date was a purely ministerial change, especially considering that at the time the amendment was promulgated, the comparable federal standards had not yet come into effect. We therefore do not find any new issues raised by the delayed start date amendment.

Having received no contrary evidence or comments regarding this amendment, we find that California has met the three criteria for a within-the-scope authorization approval. Therefore, the amendment delaying the start date for California's red tag program must be confirmed as within the scope of the previous authorization of California's OHRV regulations.

### *C. California's 2006 Amendments*

#### *1. Evaporative Emission Standards*

In 2006, California added evaporative emission standards for 2008 and later model year OHRVs to align with federal evaporative emission standards that also began with the 2008 model year, and in 2010 requested a full authorization for the inclusion of these standards. The California standards (1.5 g/m<sup>2</sup>/day for fuel tank permeation and 15.0 g/m<sup>2</sup>/day for fuel hose permeation) were exactly the same as the federal standards,<sup>52</sup> with identical test procedures. Both the California and federal standards remain the same as of this date. We received no evidence or comments contradicting or challenging authorization of this amendment.

First, CARB stated that these standards are at least as protective of public health and welfare, in the aggregate, as the federal standards, because they are identical with the

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<sup>52</sup> 40 CFR 1051.110.

federal standards.<sup>53</sup> Considering the equivalence of the federal and California evaporative emission standards and having received no evidence to the contrary, we cannot find that California’s protectiveness determination regarding the OHRV evaporative emission standards is arbitrary or capricious.

Second, California reiterated its longstanding position that compelling and extraordinary conditions in the state still need to be addressed through separate California nonroad engine and vehicle regulations.<sup>54</sup> We find no evidence to contradict California’s determination that the new evaporative standards are part of an overall approach to reducing the state’s air pollution problems, and that the state still needs its own program to address the “compelling and extraordinary conditions” that continue to exist in California.

Third, California stated that the evaporative emission standards are consistent with CAA section 209 because they apply to classes of vehicles that EPA already evaluated and found to be consistent in previous authorizations.<sup>55</sup> In those decisions, EPA found that these vehicle categories are not “new motor vehicles” preempted under CAA section 209(a) nor are they engines specifically preempted by CAA section 209(e)(1). California stated that the amendment is consistent with section 209(b)(1)(C) because the evaporative standards are identical to the federal standards that EPA already found to provide adequate lead time for technological development, and because manufacturers could use the same test vehicle to demonstrate emissions compliance with both the federal and California standards. Having received no evidence to contradict

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<sup>53</sup> 2010 Request, *supra* note 2, at 7.

<sup>54</sup> *Id.* at 8.

<sup>55</sup> For references to EPA authorizations of these standards under Large Spark Ignition (LSI) and Small Off-Road Engines (SORE) regulations, *see* 2010 Request, *supra* note 2, at fn 9, fn 10.

these statements, we do not find that the evaporative emissions standards are inconsistent with section 209 of the Act.

Having found the request meets the three criteria for a full authorization, EPA must authorize the amendment of California's evaporative emissions standard.

## 2. Reclassification of Sand Cars, Off-Road Utility Vehicles and Off-Road Sport Vehicles as OHRVs

The 2006 amendments reclassified sand cars, off-road utility vehicles and off-road sport vehicles (also known as "Class II and Class III" ATV-like vehicles) as OHRVs. The reclassification aligned California's regulations with the federal classification of these vehicle categories.<sup>56</sup> Each of these vehicle categories had previously been regulated under other federally-authorized California regulations as small off-road or large off-road spark-ignition engines.<sup>57</sup> The amendments also harmonized the carbon monoxide (CO) emission standard with the federal CO ATV emission standard (400 g/kW-hr) and maintained the existing CO + nitrogen oxides (NOx) emission standard (12 g/kW-hr), which is more strict than the parallel federal standard (13.4 g/kW).<sup>58</sup> California requested a within-the-scope determination for these amendments. EPA received no adverse comments or evidence contradicting California's request to consider these amendments as within the scope of the previous authorization.

First, California found that the reclassification amendment does not undermine the original protectiveness determination regarding its OHRV regulations because it further aligns them with the federal classification system for OHRVs. California asserted that the amended regulation therefore remains at least as protective as the federal

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<sup>56</sup> See 40 CFR 1051.1(a)(4)

<sup>57</sup> See *supra* note 55.

<sup>58</sup> See 40 CFR 1051.107(a)(1).

standards.<sup>59</sup> Also, as noted above, the emission standards for ATVs in California are clearly at least as protective as the federal standards, mirroring the federal CO standard and exceeding the stringency of the federal CO + NOx standard. Based on the record before us and in the absence of any evidence to the contrary, we cannot find that California's protectiveness determination regarding the reclassification of these vehicles as OHRVs is arbitrary or capricious.

Second, California found that the amendment does not affect consistency with section 209 of the Act. The vehicle categories to which this amendment applies have already been deemed consistent with sections 209(a) and 209(e)(1) by EPA when they were considered as part of the large spark ignition and small off-road engine regulation authorizations.<sup>60</sup> Further, California found that application of the OHRV standards to the new vehicle classes is consistent with section 209(b)(1)(C) because manufacturers had already been complying with the standards for more than two years at the time of California's request. The exhaust standards were phased in by model year 2007 and evaporative standards were phased in by model year 2008. Also, the test procedures authorized by California are identical to those adopted federally, so a single test vehicle could be used for both state and federal testing.<sup>61</sup> We conclude that the amendment has no bearing on the consistency between the California and federal certification requirements, and no evidence contradicting California's determination that the amendment is consistent with section 209(b)(1)(C). We therefore do not find the amendment is inconsistent with section 209 of the Act.

Third, California was unaware of any new issues that would arise from the

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<sup>59</sup> 2010 Request, *supra* note 2, at 8.

<sup>60</sup> See *supra* note 55.

<sup>61</sup> 2010 Request, *supra* note 2, at 9.

inclusion of these three new classes of vehicles under their OHRV regulations and standards.<sup>62</sup> EPA similarly finds no new issues arising from the amendment.

Having received no evidence or comments to the contrary, we find that California's 2006 amendment to reclassify off-road sport vehicles, off-road utility vehicles, and sand cars as OHRVs meets the three criteria for a within-the-scope determination. We therefore find that this amendment is within the scope of the previous authorization of the OHRV program.

### 3. Amendment of Riding Seasons and Areas List

Third, the list of riding areas and riding seasons was amended. California asserted that this amendment does not require EPA authorization because it pertains to an operational control that cannot be federally preempted, pursuant to section 209(d) of the Act.<sup>63</sup> Under section 209(d), nothing in Subchapter II, Part A of the Act restricts states' ability to "control, regulate, or restrict the use, operation or movement of registered or licensed motor vehicles." California therefore requested that EPA confirm that the riding season restriction amendment was and is enforceable without further action by the EPA Administrator. Amendments to the times and places where certain vehicles are allowed to operate is the very essence of an "operational control." EPA received no comments challenging or denying California's proposed treatment. Therefore, EPA confirms that the amended list of riding seasons and areas does not require authorization by the Administrator because it is not federally preempted by the Act.

## III. Decision

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<sup>62</sup> *Id.*

<sup>63</sup> *See Id.* California also requested that in the alternative, the riding areas/seasons amendment be considered within the scope of the 1996 authorization.

The Administrator has delegated the authority to grant California section 209(e) authorizations to the Assistant Administrator for Air and Radiation. After evaluating CARB's amendments to its OHRV regulations described above and CARB's submissions for EPA review, EPA is taking the following actions.

First, EPA is granting an authorization for both the red tag certification program and the removal of the exemption for competition models from California's OHRV regulations. Second, EPA is granting an authorization for the removal of the 600 lb weight limit from the definition of ATV in California's OHRV regulations. Third, EPA confirms that California's 2003 amendment to delay the start date of the red tag program is within the scope of the previous authorization. Fourth, EPA is granting an authorization for the addition of evaporative emission standards to California's OHRV regulations, starting with the 2008 model year. Fifth, EPA confirms that California's 2006 amendment to reclassify sand cars, off-road utility vehicles, and off-road sports vehicles as OHRVs is within the scope of the previous authorization. Finally, EPA confirms that amendments to the list of riding areas and seasons for California's red-tagged OHRVs are not preempted by the Act and do not require EPA authorization.

My decision will affect not only persons in California, but also manufacturers outside the state who must comply with California's requirements in order to produce vehicles for sale in California. For this reason, I determine and find that this is a final action of national applicability, and also a final action of nationwide scope and effect, for purposes of section 307(b)(1) of the Act. Pursuant to section 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by

[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Judicial review of this final action may not be obtained in subsequent

enforcement proceedings, pursuant to section 307(b)(2) of the Act.

#### **IV. Statutory and Executive Order Reviews**

As with past authorization and waiver decisions, this action is not a rule as defined by Executive Order 12866. Therefore, it is exempt from review by the Office of Management and Budget as required for rules and regulations by Executive Order 12866.

In addition, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. § 601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities.

Further, the Congressional Review Act, 5 U.S.C. § 801, *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. § 804(3).

Dated: January 27, 2014.

Janet G. McCabe  
Acting Assistant Administrator  
Office of Air and Radiation

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